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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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ON DEMAND DIRECT RESPONSE, LLC,
DISTRICT OF NEVADA AND ON
DEMAND DIRECT RESPONSE III, LLC,

Plaintiff,

v.

SHANA LEE MCCART-POLLAK d/b/a
LOL BUDDIES ENTERPRISES,

Defendants.

Case No. 2:15-cv-01576-MMD-NJK

ORDER

ALL RELATED ACTIONS

I. SUMMARY

Before the Court is Third Party Defendant Kevin Harrington’s (“Harrington”) Motion to Dismiss Third-Party Plaintiff Shana Lee McCart-Pollak’s (“Plaintiff”) Amended Third Party Complaint (“Motion”). (ECF No. 233.) The Court has reviewed Plaintiff’s opposition (ECF No. 253) and Harrington’s reply (ECF No. 256). For the reasons discussed below, the Motion is granted in part and denied in part.

After completion of the briefing on the Motion, Plaintiff filed a supplement to her opposition. (ECF No. 264.) In response, Harrington moved to strike. (ECF No. 266.) The Court grants Harrington’s motion to strike because Plaintiff’s supplement was filed without leave of court. See LR 7-2(g). As the Court previously observed, the issues raised in the briefs relating to Plaintiff’s third party claims have been thoroughly briefed.

1 Plaintiff subsequently filed a motion to supplement. (ECF No. 271.) Harrington
2 filed a response (ECF No. 272) and Plaintiff has replied (ECF No. 274). The Court
3 denies Plaintiff's motion to supplement because the Court reviews Harrington's Motion
4 based on the allegations in the Amended Third Party Complaint ("ATPC").

5 **II. RELEVANT BACKGROUND**

6 A more thorough discussion of the background facts appears in the Court's
7 Orders entered on September 30, 2016 ("Dismissal Order"), and December 23, 2016
8 ("Reconsideration Order"). (ECF Nos. 191, 215.) As relevant to the Motion, the Court
9 previously dismissed Plaintiff's claims against Third Party Defendants asserted in a
10 complaint attached to Plaintiff's First Motion to Amend ("Draft Complaint") (ECF No.
11 143), but the Court granted Plaintiff leave to amend two claims for unjust enrichment
12 and fraud against Harrington. (ECF No. 191.) Plaintiff moved for reconsideration. (ECF
13 No. 194.) The Court denied her motion, but in doing so considered the Proposed First
14 Amended Third Party Complaint ("FATPC") attached to her Second Motion to Amend
15 (ECF No. 190). The Court found that the FATPC, as with the Draft Complaint, fails to
16 state a claim. (ECF No. 215 at 6-7.) However, the Court gave Plaintiff leave to amend
17 two claims against Harrington:

18 [Plaintiff] understandably did not have the benefit of the Court's analysis in
19 drafting the allegations relating to her claims for unjust enrichment and
20 fraud against Harrington. The Court will therefore extend leave to amend
to cure the deficiencies of these two claims as identified in the Dismissal
Order.

21 (*Id.* at 7.)

22 Plaintiff then filed the ATPC which repeats the dismissed claims and names
23 Harrington as well as the other Third Party Defendants.¹ (ECF No. 231.) Harrington
24 again moves for dismissal.

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27 ¹The Court addressed claims against the other Third Party Defendants in a
28 separate order. (ECF No. 273.)

III. LEGAL STANDARD

A court may dismiss a plaintiff's complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). A properly pled complaint must provide "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). While Rule 8 does not require detailed factual allegations, it demands more than "labels and conclusions" or a "formulaic recitation of the elements of a cause of action." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 555.) "Factual allegations must be enough to rise above the speculative level." *Twombly*, 550 U.S. at 555. Thus, to survive a motion to dismiss, a complaint must contain sufficient factual matter to "state a claim to relief that is plausible on its face." *Iqbal*, 556 U.S. at 678 (internal citation omitted). Moreover, the notice pleading requirements of Rule 8(a) can be violated not only "when a pleading says *too little*," but also "when a pleading says *too much*." *Knapp v. Hogan*, 738 F.3d 1106, 1109 (9th Cir. 2013), *cert. denied*, 135 S. Ct. 57 (Oct. 6, 2014); *see also McHenry v. Renne*, 84 F.3d 1172, 1179-80 (9th Cir.1996) (affirming a dismissal under Rule 8, and recognizing that "[p]rolix, confusing complaints such as the ones plaintiffs filed in this case impose unfair burdens on litigants and judges").

In *Iqbal*, the Supreme Court clarified the two-step approach district courts are to apply when considering motions to dismiss. First, a district court must accept as true all well-pled factual allegations in the complaint; however, legal conclusions are not entitled to the assumption of truth. *Id.* at 678-79. Mere recitals of the elements of a cause of action, supported only by conclusory statements, do not suffice. *Id.* at 678. Second, a district court must consider whether the factual allegations in the complaint allege a plausible claim for relief. *Id.* at 679. A claim is facially plausible when the plaintiff's complaint alleges facts that allow a court to draw a reasonable inference that the defendant is liable for the alleged misconduct. *Id.* at 678. Where the complaint does not permit the court to infer more than the mere possibility of misconduct, the complaint has

1 “alleged—but it has not show[n]—that the pleader is entitled to relief.” *Id.* at 679 (internal
2 quotation marks omitted). When the claims in a complaint have not crossed the line
3 from conceivable to plausible, the complaint must be dismissed. *Twombly*, 550 U.S. at
4 570. A complaint must contain either direct or inferential allegations concerning “all the
5 material elements necessary to sustain recovery under some viable legal theory.”
6 *Twombly*, 550 U.S. at 562 (quoting *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101,
7 1106 (7th Cir. 1989) (emphasis in original)).

8 Mindful of the fact that the Supreme Court has “instructed the federal courts to
9 liberally construe the ‘inartful pleading’ of *pro se* litigants,” *Eldridge v. Block*, 832 F.2d
10 1132, 1137 (9th Cir. 1987), the Court will again review Plaintiff’s ATPC with the
11 appropriate degree of leniency.

12 **IV. DISCUSSION**

13 **A. Claims Previously Dismissed**

14 The Court granted Plaintiff leave to amend only two claims against Harrington—
15 unjust enrichment and fraud. (ECF Nos. 191, 215.) Accordingly, claims asserted against
16 the other Third Party Defendants and claims other than the two permitted against
17 Harrington in violation of the Court’s previous Orders will be stricken. (ECF No. 273.)

18 **B. Fraud**

19 Harrington argues that Plaintiff’s ATPC fails to state a claim in that Plaintiff
20 alleges fraud through Harrington’s implied conduct, not through any affirmative
21 misrepresentation. (ECF No. 233 at 7.) The Court agrees.

22 In Nevada, the elements of fraud include: (1) a false representation made by the
23 defendant; (2) defendant’s knowledge or belief that its representation was false or that
24 defendant has an insufficient basis of information for making the representation; (3)
25 defendant intended to induce plaintiff to act or refrain from acting upon the
26 misrepresentation; and, (4) damage to the plaintiff as a result of relying on the
27 misrepresentation. *Barnettler v. Reno Air, Inc.*, 956 P.2d 1382, 1386 (Nev. 1998).

1 Plaintiff alleges that Harrington “impl[ie]d a future partnership and false promise
2 to get back to [Plaintiff], but instead flipped the ‘Lots of Love Buddies’ concept and
3 brochure to Third Party Defendants to knockoff and take to market a similar product
4 ‘CloudPets.’” (ECF No. 225 at 23.) With respect to the future partnership, Plaintiff
5 alleges that “Harrington agreed and offered [her] the opportunity to pitch her concept
6 with the intent that he would partner with her if he moved forward with her idea.” (ECF
7 No. 225 at 7.)

8 Accepting Plaintiff’s allegations as true, the Court cannot reasonably infer that
9 Harrington affirmatively made the representation that he will partner with Plaintiff. In
10 fact, Plaintiff alleges that Harrington implied that “he would partner with her if he moved
11 forward with her idea.” (*Id.* at 7.) Thus, based on Plaintiff’s allegations, Harrington did
12 not falsely affirmatively represent without any equivocation that he would partner with
13 her or would follow up with her.

14 Plaintiff’s allegations fail to satisfy the first element of a claim for fraud. Given the
15 multiple opportunities that Plaintiff has had to amend her fraud claim against Harrington,
16 the fraud claim will be dismissed with prejudice.

17 **C. Unjust Enrichment**

18 “The doctrine of unjust enrichment or recovery in quasi contract applies to
19 situations where there is no legal contract but where the person sought to be charged is
20 in possession of money or property which in good conscience and justice he should not
21 retain but should deliver to another [or should pay for].” *Leasepartners Corp.*, 942 P.2d
22 182, 187 (Nev. 1997) (quoting 66 Am. Jur. 2d Restitution § 11 (1973)). “Unjust
23 enrichment exists when the plaintiff confers a benefit on the defendant, the defendant
24 appreciates such benefit, and there is acceptance and retention by the defendant of
25 such benefit under circumstances such that it would be inequitable for him to retain the
26 benefit without payment of the value thereof. *Certified Fire Prot. Inc. v. Precision*
27 *Constr.*, 283 P.3d 250, 257 (Nev. 2012). Moreover, the plaintiff must show some direct

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1 relationship or dealings between the plaintiff and the defendant. *Zalk-Josephs Co. v.*
2 *Wes Cargo, Inc.*, 366 P.2d 339, 342 (Nev. 1961).

3 According to Plaintiff, Harrington took her “Lots of Love Buddies” idea and
4 brochure, including all the work that went into her concept, which allowed Harrington
5 and others to bring her concept to market. (ECF No. 225 at 8-16.) Accepting these
6 allegations as true, Plaintiff sufficient alleges that she conferred a benefit on
7 Harrington—Plaintiff’s “Lots of Love Buddies” concept, including brochure and
8 “blueprints” (*id.* at 10)—and Harrington retained the benefits of Plaintiff’s idea under
9 circumstances such that it would be inequitable for him to retain. The Court finds that
10 Plaintiff has stated a claim for unjust enrichment against Harrington.

11 **V. CONCLUSION**


12 The Court notes that the parties made several arguments and cited to several
13 cases not discussed above. The Court has reviewed these arguments and cases and
14 determines that they do not warrant discussion as they do not affect the outcome of the
15 motions before the Court.

16 It is therefore ordered that Third Party Defendant Kevin Harrington’s motion to
17 dismiss (ECF No. 233) is granted in part and denied in part. The unjust enrichment
18 claim will proceed against Harrington. The fraud claim is dismissed. All other claims and
19 claims against the other Third Party Defendants will be stricken from the Amended Third
20 Party Complaint.

21 It is further ordered that Harrington’s motion to strike (ECF No. 266) is granted.
22 Plaintiff’s supplement (ECF No. 264) will be stricken.

23 It is further ordered that Plaintiff’s motion to supplement (ECF No. 271) is denied.

24 DATED THIS 4th day of August 2017.

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27 MIRANDA M. DU
28 UNITED STATES DISTRICT JUDGE